

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD**

**BEFORE SHRI PRAMOD M. JAGTAP, VICE PRESIDENT
&
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. Nos.739 & 740/Ahd/2017
(Assessment Year: 2007-08 & 2008-09)

The Deputy Commissioner of Income-tax Sabarkantha Circle, Himmatnagar	Vs.	M/s. Crystal Glaze (Now known as M/s. Crystal Ceramic Industries Ltd.) B-19, Vishnu Park Society, B/H Bhagyodaya Tenaments, Opp. Bethak, Naroda, Ahmedabad - 382325
PAN No.AACFC0926H		
(Appellant)	..	(Respondent)

Appellant by :	Shri R R Makwana, Sr. DR
Respondent by :	Shri Aseem L Thakkar, A.R.

Date of Hearing	08.09.2022
Date of Pronouncement	02.11.2022

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeals filed by the Revenue are directed against the orders dated 10.01.2017 & 23.01.2017 passed by the Ld. Commissioner of Income Tax (Appeals) – 2, Ahmedabad (in short ‘the CIT(A)’) arising out of the orders dated 20.03.2015 & 23.03.2015 passed by the Deputy Commissioner of Income Tax, Sabarkantha Circle, Himmatnagar, under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for A.Ys. 2007-08 & 2008-09; respectively.

ITA No. 739/Ahd/2017 for A.Y. 2007-08

2. The deletion of addition of Rs.1,33,61,517/- made on account of suppression of sales is the subject matter before us.

3. The return filed by the assessee was finalized under Section 143(3) of the Act dated 27.10.2007 declaring total income at Rs.Nil upon allowing set off of carried forward depreciation. Subsequently, under Section 143(3) r.w.s. 147 of the Act, the Ld. ITO on 27.03.2014 determined the total income at Rs.2,11,40,325/-. Such reopening was made on the basis of information received by the Directorate General of Central Excise (Intelligence), Ahmedabad, where it has been stated to be a fact of the assessee indulged in evasion of Excise Duty by mis-declaration of maximum retail price of ceramics manufactured by it. The assessee since found to be concealed the particulars of income, the reopening under Section 147 of the Act was made. Despite several requests, the assessee did not furnish the details of goods cleared by it during the period from 01.04.2006 to 31.03.2007. The income concealed by the assessee was worked out on the gross profit percentage to the total turnover for the F.Y. 2006-07, where the assessee has a gross profit ratio of 18.97% of the total turnover. The DGCEI worked out under valuation of goods to the tune of Rs.16,83,72,637/- during the period June 2005 to January 2008. Distributing the undervalued turnover in the three financial years in proportion of turnover during these three years, the value of under valuation of goods on account of misdeclaration of MRP for the F.Y. 2006-07 comes to Rs.4,25,19,856/- and the income escaped assessment was, therefore, comes to Rs.80,66,016/-, which was added on protected basis in the hands of the

assessee. Furthermore, suppression of sales was found to be Rs.7,04,34,989/- and applying GP rate at 18.97% Rs.1,33,61,517/- was added to the total income of the assessee, which was, in turn, deleted by the Ld. CIT(A), on the premise that reopening has been made on the basis of the show cause notice issued by the Excise Authority which has culminated into the final order, which is not justifiable in terms of the order passed by the Hon'ble Gujarat High Court in the case of Futura Ceramics Pvt. Ltd. vs. State of Gujarat Thro Secretary & Ors. in Special Civil Application No.6500 of 2012.

4. At the time of hearing of the instant appeal, the Ld. DR relied upon the order of Assessing Officer. On the other hand, the Ld. Counsel appearing for the assessee submitted before us that the issue is duly covered by the judgment passed by the Hon'ble Gujarat High Court in the case of Futura Ceramics Pvt. Ltd. (supra), which has been relied upon by the Ld.CIT(A). He further relied upon the judgment in case of Zirconia Cera Tech Glazes vs. DCIT, Mehsana Circle, reported in [2019] 109 taxmann.com 73 (Ahmedabad-Trib.)

5. We have considered the judgment passed by the Co-ordinate Bench in case of Zirconia Cera Tech Glazes vs. DCIT (supra) wherein addition was made only on basis of show cause notice issued by Excise Department against assessee alleging that assessee was engaged in undervaluation of sales and clandestine removal of goods and revenue had brought nothing on record that it had applied its mind over and above contents of said show cause notice and further, in excise proceedings, CESTAT had decided issue in favour of assessee, impugned addition was unjustified.

6. We have considered the judgment passed by the Futura Ceramics Pvt. Ltd. vs. State of Gujarat (supra), wherein it has been held as under:

“From the above, it can be seen that the assessment which was previously concluded was reopened on the premise that during the excise raid, it was revealed that the petitioner had clandestinely removed goods without payment of excise duty. The Sales Tax Department, therefore, formed a belief that the value of goods plus excise duty evaded should form part of the turnover of the assessee for the purpose of tax under the Value Added Tax Act.

It may be that the raid carried out by the Excise Department and the material collected during such proceedings culminating into issuance of a show-cause notice for recovery of unpaid excise duty and penalty in a given case sufficient to re-open previously closed assessment. In this case, however, we are not called upon to judge this issue and would therefore not give any definite opinion. The question, however, is whether on a mere show cause issued by the Excise Department, the Sales Tax Department can make additions for the purpose of collecting tax under the Gujarat Value Added Tax Act without any further inquiry. If the Assistant Commissioner of Commercial Tax has utilized the material collected by the Excise Department; including the statements of the petitioner and other relevant witnesses and had come to an independent opinion that there was in fact evasion of excise duty by clandestine removal of goods, he would have been justified in making additions for the purpose of VAT Act. In the present case, however, no such exercise was undertaken. All that the assessing officer did was to rely on the show-cause notice issued by the Excise Department. Nowhere did he conclude that there was a case of clandestine removal of goods without payment of tax under the VAT Act. Merely because the Excise Department issued a show-cause notice, that cannot be a ground to presume and conclude that there was evasion of excise duty implying thereby that there was also evasion of tax under the VAT Act. It is not even the case of the Department that such show-cause notice proceedings has culminated into any final order against the petitioner. We wonder what would happen to the order of reassessment, if ultimately the Excise Department were to drop the proceedings without levying any duty or penalty from the petitioner.

All in all, the Asstt. Commissioner has acted in a mechanical manner and passed final order of assessment merely on the premise that the Excise Department has issued a show-cause notice alleging clandestine removal of the goods. Such order, therefore, cannot be sustained and is accordingly quashed. When the order is ex facie illegal and wholly untenable in law, mere availability of alternative remedy would not preclude us from interfering at this stage in a writ petition.”

7. We did not find any reason to deviate from the stand taken by the Co-ordinate bench. Hence, relied upon the same, we find that the order passed by the Ld. CIT(A) in deleting the addition holding reopening on the basis of the show cause issued by Excise Department not justified is just and proper so as

to warrant interference. In that view of the matter, the Revenue's ground of the appeal is found to be devoid of any merit and thus dismissed.

8. Since the above issue is also identical to the Revenue's appeal for A. Y. 2008-09 in ITA No.740/Ahd/2017, in the absence of any changed circumstances, our finding and decision in the Asst.Year 2007-08 in ITA No.739/Ahd/2017 will apply mutatis mutandis in the instant appeal also.

9. In the result, Revenue's both appeals are dismissed.

This Order pronounced on 02/11/2022

Sd/-
(P. M. JAGTAP)
VICE PRESIDENT
Ahmedabad; Dated 02/11/2022

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad